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MENTERI DALAM NEGERI, MALAYSIA & ANOR v. SEYED RAMIN PAKNEJAD

FEDERAL COURT, PUTRAJAYA
ARIFIN ZAKARIA CJ
ZULKEFLI AHMAD MAKINUDIN CJ (MALAYA)
B AHMAD MAAROP FCJ
ZAHARAH IBRAHIM FCJ
ABANG ISKANDAR JCA
[CRIMINAL APPEAL NO: 05-93-04-2016(W)]
20 MARCH 2017

C

CRIMINAL PROCEDURE: *Extradition – Order for committal to prison pending extradition – Whether committal order offended rules of speciality and dual criminality – Whether there was extradition agreement that provides for rule of speciality – Whether there was compelling evidence that requesting State would act* D *in breach of rule of speciality – Whether rule of dual criminality had been satisfied – Extradition Act 1992, ss. 2, 2(4), 6, 8(e), 13(1)*

A warrant of arrest dated 27 July 2012 was issued by the Bangkok Criminal Court against the respondent. The Government of Thailand made a request to the Government of Malaysia *via* a letter of request dated 21 August 2013 E for a temporary warrant of arrest to be issued against the respondent, under the Extradition Treaty concluded between Great Britain and Siam on 4 March 1911 and made applicable to Malaya (and later Malaysia) and the Government of the Kingdom of Thailand by way of Diplomatic Notes dated 17 October 1959 and recognised through the Extradition (Thailand) Order F 1992 ('Thailand Order') made under the Extradition Act 1992 ('Extradition Act'). On 27 August 2013, the Kuala Lumpur Magistrate's Court issued a provisional warrant of arrest against the respondent under s. 13(1) of the Extradition Act and the respondent was arrested. On 25 March 2013, an order was made for the transfer of the case to the Sessions Court and the G respondent was ordered to be remanded until he was brought before the Sessions Court. Subsequently, the Public Prosecutor made an application to have the respondent committed to prison pending the order of the Minister for Home Affairs ('the first appellant') to surrender the respondent to the Government of Thailand. The warrant of committal was issued by the Sessions Court on 10 January 2014 ('warrant of committal'). The H respondent, therefore, filed an application for a writ of *habeas corpus* at the High Court but the application was dismissed on 26 March 2014. The respondent appealed and the Federal Court allowed the appeal and ordered the case to be re-heard before another High Court Judge ('HCJ') as the decision of the High Court on 26 March 2014 was made without the benefit I of the grounds of judgment of the Sessions Court Judge who issued the warrant of committal. Hence, the case was re-heard before another HCJ and found that the affidavits indicated that the respondent would be prosecuted

for additional offences other than those in the charges for which extradition was requested, and there was no undertaking by the Government of Thailand that the respondent would face only those charges. Consequently, the HCJ allowed the application for a writ of *habeas corpus* and ordered the respondent be released from detention. Hence, this appeal by the appellants. The issue for determination in this appeal was whether the committal order by the Sessions Court pending the extradition order by the Minister offends the rule of speciality and the rule of dual criminality.

Held (allowing appeal)
Per Zaharah Ibrahim FCJ delivering the judgment of the court:

(1) The extradition of fugitive offenders must be as provided for by the Legislature. In Malaysia, the law in force in relation to the extradition of fugitive offenders is as contained in the Extradition Act. The Thailand Order, embodying the terms of the arrangement between Malaysia and Thailand, was made by the Minister under s. 2 of the Extradition Act on 10 July 1992. The Order was published in the *gazette* as PU(A) 269/1992 and deemed to have come into force on 21 February 1992, the date of coming into operation of the Extradition Act. By virtue of s. 2(4) of the Extradition Act, the Thailand Order is 'conclusive evidence' that the arrangement referred to in the Thailand Order 'complies with the provisions of this Act', and that the Extradition Act applies in the case of Thailand, and 'the validity of such order shall not be questioned in any legal proceedings whatsoever'. (paras 30, 31, 33 & 34)

(2) The rule of speciality prohibits the State requesting the extradition of a person from prosecuting or punishing the extradited person for offences other than those for which the request for his extradition was based and for which he was extradited, subject to exceptions as provided for in the applicable extradition law. In view of the provisions of s. 2 of the Extradition Act and the Thailand Order, there is conclusive evidence that there is in existence with Thailand an extradition agreement that provides for the rule of speciality. Therefore, the provisions of s. 8(e) of the Extradition Act had been complied with. (paras 35, 38 & 39)

(3) If there is compelling evidence that the requesting State (in this case Thailand) will act in breach of the rule of speciality, an extradition order cannot be granted. Hence, compelling evidence is required to displace the presumption. The affidavits by three Thai officers could not be said to be 'compelling evidence' that the Thai authorities would act in breach of the rule of speciality as specified in the Treaty embodied in the Thailand Order. The issue of the Thai Government providing an undertaking therefore did not arise. (paras 41, 43 & 53)

(4) The rule of dual/double criminality in extradition law requires that, in order to be an extraditable offence, the act constituting the offence must be an offence in both the requesting and requested States and must have been committed in the territory of the requesting State. The charges against the respondent according to the case filed in the Criminal Court in Thailand are for possession of heroin and document forgery. For the nine charges of counterfeiting/forgery, what was intended to be proved was that the counterfeited documents would be used for cheating, which is an offence under s. 468 of the Penal Code. Further, the offence of forgery is clearly listed as item 6 in the list of offences in art. II of the Treaty embodied in the Thailand Order. In relation to the charge for possession of narcotics (heroin), the equivalent provision in Malaysian law is contained in Part IV of the Dangerous Drugs Act 1952, specifically sub-s. 11(1) and sub-s. 12(2) and (3). Therefore, provisions of s. 6 of the Extradition Act on dual criminality had been clearly satisfied. (paras 55, 56, 65, 66 & 70)

(5) There was absence of offences relating to possession of narcotics in the list of extradition offences in the Treaty embodied in the Thailand Order. Pursuant to art. II of the Treaty in the Thailand Order, the discretion lies with the State to which the extradition request is made as to whether to grant extradition for an offence not listed in art. II. Thus, it is that State which is in the best position to determine if the grant can be made. In the instant case, the request had been made to Malaysia but the Minister had yet to make his order for extradition at the point in time that the application for *habeas corpus* was made by the respondent. The fact that the request was being processed by the Malaysian Government in accordance with the Thailand Order and the Extradition Act was *prima facie* evidence of the Government's satisfaction that the grant could be made. In any event, an extradition order can certainly be made based on the nine forgery charges. (paras 71-77)

Bahasa Malaysia *Headnotes*

Mahkamah Jenayah Bangkok telah mengeluarkan waran tangkap bertarikh 27 Julai 2012 terhadap responden. Kerajaan Thailand memohon pada Kerajaan Malaysia melalui surat permohonan bertarikh 21 Ogos 2013 bagi waran tangkap sementara dikeluarkan terhadap responden, bawah Perjanjian Ekstradisi yang dibuat antara Great Britain dan Siam pada 4 Mac 1911 dan diguna pakai di Malaya (kemudian Malaysia) dan Kerajaan Negara Thailand melalui Nota Diplomatik bertarikh 17 Oktober 1959 dan diiktiraf melalui Extradition (Thailand) Order 1992 ('Perintah Thailand') yang dibuat bawah Akta Ekstradisi 1992 ('Akta Ekstradisi'). Pada 27 Ogos 2013, Mahkamah Majistret Kuala Lumpur mengeluarkan waran tangkap sementara terhadap responden bawah s. 13(1) Akta Ekstradisi dan responden ditangkap. Pada 25 Mac 2013, satu perintah dibuat untuk memindahkan kes tersebut ke Mahkamah Sesyen dan responden diperintahkan ditahan sehingga dia dibawa

ke Mahkamah Sesyen. Kemudian, Pendakwa Raya membuat permohonan untuk pengkomitan responden ke penjara sementara menunggu perintah Menteri Dalam Negeri ('perayu pertama') untuk menyerahkan responden kepada Kerajaan Thailand. Waran pengkomitan dikeluarkan oleh Mahkamah Sesyen pada 10 Januari 2014 ('waran pengkomitan'). Responden, oleh itu, memfailkan permohonan bagi writ *habeas corpus* di Mahkamah Tinggi tetapi permohonan tersebut ditolak pada 26 Mac 2014. Responden merayu dan Mahkamah Persekutuan membenarkan rayuan tersebut dan memerintahkan kes itu dibicarakan semula di hadapan Hakim Mahkamah Tinggi ('HMT') yang lain kerana keputusan Mahkamah Tinggi pada 26 Mac 2014 dibuat tanpa faedah alasan penghakiman Hakim Mahkamah Sesyen yang mengeluarkan waran pengkomitan. Dengan itu, kes tersebut dibicarakan semula di hadapan HMT lain dan afidavit-afidavit didapati menunjukkan responden akan didakwa bagi kesalahan-kesalahan tambahan selain daripada yang terkandung dalam pertuduhan terhadap mana ekstradisi dipohon, dan tiada aku janji diberi oleh Kerajaan Thailand bahawa responden hanya akan menghadapi pertuduhan-pertuduhan tersebut. Dengan itu, HMT membenarkan permohonan bagi writ *habeas corpus* dan memerintahkan responden dilepaskan daripada tahanan. Maka, rayuan ini oleh perayu-perayu. Isu untuk pertimbangan dalam rayuan ini adalah sama ada perintah pengkomitan oleh Mahkamah Sesyen sementara menunggu perintah pengkomitan oleh Menteri melanggar kaedah-kaedah keistimewaan dan kaedah-kaedah jenayah berganda.

Diputuskan (membenarkan rayuan)
Oleh Zaharah Ibrahim HMP menyampaikan penghakiman mahkamah:

(1) Ekstradisi pesalah pelarian mestilah seperti yang diperuntukkan oleh perundangan. Di Malaysia, undang-undang yang berkuat kuasa berkaitan dengan pesalah pelarian adalah seperti dalam Akta Ekstradisi. Perintah Thailand, dengan terma-terma pengaturan antara Malaysia dan Thailand, dibuat oleh Menteri bawah s. 2 Akta Ektradisi pada 10 Julai 1992. Perintah tersebut diterbitkan dalam *warta* sebagai PU(A) 269/1992 dan dianggap berkuat kuasa pada 21 Februari 1992, tarikh Akta Ekstradisi mula berkuat kuasa. Menurut s. 2(4) Akta Ekstradisi, Perintah Thailand adalah 'keterangan konklusif' bahawa pengaturan yang dirujuk dalam Perintah Thailand 'mematuhi peruntukan Akta ini', dan bahawa Akta Ekstradisi diguna pakai dalam kes Thailand, dan 'keesahan perintah sedemikian tidak wajar dipersoalkan oleh apa-apa prosiding undang-undang'.

(2) Kaedah keistimewaan melarang negara yang memohon ekstradisi seseorang daripada mendakwa atau menghukum seseorang yang diekstradisi bagi kesalahan-kesalahan selain yang menjadi asas permohonan ekstradisinya dan bagi mana dia diekstradisi, tertakluk pada pengecualian yang diperuntukkan dalam undang-undang ekstradisi yang terpakai. Berdasarkan peruntukan-peruntukan s. 2 Akta Ekstradisi

dan Perintah Thailand, terdapat keterangan konklusif bahawa perjanjian ekstradisi yang memperuntukkan kaedah-kaedah keistimewaan wujud di Thailand. Oleh itu, peruntukan-peruntukan s. 8(e) Akta Ekstradisi telah dipatuhi.

(3) Jika terdapat keterangan yang meyakinkan bahawa negara yang memohon (dalam kes ini Thailand) akan bertindak melanggar kaedah-kaedah keistimewaan, perintah ekstradisi tidak boleh dibenarkan. Oleh itu, keterangan yang meyakinkan diperlukan untuk mematahkan anggapan tersebut. Afidavit-afidavit tiga pegawai Thai tidak boleh dikatakan 'keterangan yang meyakinkan' bahawa pihak berkuasa Thai akan bertindak melanggar kaedah-kaedah keistimewaan yang dinyatakan dalam Perjanjian yang termaktub dalam Perintah Thailand. Oleh itu, isu Kerajaan Thai perlu memberi aku janji, tidak timbul.

(4) Kaedah-kaedah jenayah berganda dalam undang-undang ekstradisi mengkehendaki bahawa, untuk membentuk kesalahan yang boleh diekstradisi, tindakan yang membentuk kesalahan tersebut semestinya menjadi kesalahan di kedua-dua negara yang memohon dan negara yang dipohon dan mesti dilakukan dalam bidang kuasa negara yang memohon. Pertuduhan-pertuduhan terhadap responden mengikut kes yang difailkan di Mahkamah Jenayah Thailand adalah bagi milikan heroin dan penipuan dokumen. Bagi sembilan kesalahan pemalsuan/penipuan, apa yang diniatkan untuk dibuktikan adalah bahawa dokumen-dokumen yang dipalsukan akan digunakan untuk menipu, satu kesalahan di bawah s. 468 Kanun Keseksaan. Selanjutnya, kesalahan penipuan jelas dinyatakan sebagai item 6 dalam senarai kesalahan-kesalahan dalam art. II perjanjian yang termaktub dalam Perintah Thailand. Bagi pertuduhan terhadap milikan heroin, peruntukan setara dalam undang-undang Malaysia terkandung dalam Bahagian IV Akta Dadah Berbahaya, khususnya sub-s. 11(1) dan sub-s. 12(2) dan (3). Oleh itu, peruntukan-peruntukan s. 6 Akta Ekstradisi bagi kaedah-kaedah jenayah berganda jelas dipenuhi.

(5) Kesalahan-kesalahan berkaitan milikan heroin tidak termasuk dalam senarai kesalahan-kesalahan ekstradisi dalam Perjanjian yang termaktub dalam Perintah Thailand. Menurut art. II Perjanjian dalam Perintah Thailand, budi bicara terletak pada negara permohonan dibuat; sama ada hendak membenarkan ekstradisi bagi kesalahan yang tidak disenaraikan dalam art. II. Oleh itu, negara itu yang berkedudukan paling baik untuk menentukan sama ada permohonan boleh dibenarkan. Dalam kes ini, permohonan dibuat pada Malaysia tetapi Menteri belum memberikan perintah ekstradisi pada masa permohonan *habeas corpus* dibuat oleh responden. Fakta bahawa permohonan tersebut sedang diproses oleh Kerajaan Malaysia berikutan Perintah Thailand dan Akta Ekstradisi adalah keterangan *prima facie* bahawa Kerajaan berpuas hati permohonan

tersebut wajar dibenarkan. Walau apapun, perintah ekstradisi sememangnya boleh dibenarkan berdasarkan sembilan pertuduhan penipuan.

Case(s) referred to:
Brodziak v. Circuit Court in Warsaw, Poland And Other Appeals [2013] EWHC 3394 ***(refd)***
Edutanu v. Iasi Court of Law (Romania) [2016] EWHC 124 (Admin) ***(refd)***
Hilali v. Central Court of Criminal Proceedings No. 5 of the National Court of Madrid and Another [2006] 4 All ER 435 ***(refd)***
Ruiz and Others v . Central Criminal Court No. 5 of the National Court, Madrid [2008] 1 WLR 2798 ***(refd)***
Shankaran v. India And Another [2014] EWHC 957 ***(refd)***

Legislation referred to:
Dangerous Drugs Act 1952, ss. 11(1), 12(2), (3)
Extradition Act 1992, ss. 2(4), 6, 10(3), 13(1), 19(4), (5)
Penal Code, ss. 463, 464, 465, 468

Penal Code [Thai], ss. 91, 264
Narcotics Act [Thai], ss. 7, 15, 67

Other source(s) referred to:
Jones and Dooby on Extradition and Mutual Assistance, 3rd edn, p 10

For the appellants - Awang Armadajaya Awang Mahmud, Nadia Hanim Mohd Tajuddin & Faizul Aswad Masri; SFCs
For the respondent - Muhammad Shafee Abdullah & Sarah Abishegam; M/s Shafee & Co

[Editor's note: For the Court of Appeal judgment, please see Sayed Ramin Paknejab lwn. Menteri Dalam Negeri, Malaysia & Satu Lagi [2016] 6 CLJ 136 (overruled).]

Reported by S Barathi

JUDGMENT

Zaharah Ibrahim FCJ:

Introduction

[1] This is an appeal by the appellants against the decision of the High Court which allowed the respondent's application for a writ of *habeas corpus* to be issued for his release from detention pursuant to the warrant of committal issued by the Sessions Court pending the order for extradition by the first appellant.

[2] We heard the appeal on 26 April 2016 and allowed the appeal. We now give our reasons for that decision.

Background Facts

[3] The facts of this case are as set out below.

[4] A warrant of arrest dated 27 July 2012 was issued by the Bangkok Criminal Court against the respondent.

[5] Subsequently, the Government of Thailand made a request to the Government of Malaysia *via* a letter of request dated 21 August 2013 for a temporary warrant of arrest to be issued against the respondent. The request was made under the Extradition Treaty concluded between Great Britain and Siam on 4 March 1911 and made applicable to Malaya (and later Malaysia) and the Government of the Kingdom of Thailand by way of Diplomatic Notes dated 17 October 1959 and recognised through the Extradition (Thailand) Order 1992 ("Thailand Order") made under the Extradition Act 1992 ("Extradition Act")

[6] On 27 August 2013 the Kuala Lumpur Magistrate's Court issued a provisional warrant of arrest against the respondent under sub-s. 13(1) of the Extradition Act. The respondent was arrested. On 25 March 2013, an order was made for the transfer of the case to the Sessions Court and the respondent was ordered to be remanded until he was brought before the Sessions Court.

[7] On 12 November 2013 the Public Prosecutor made an application to have the respondent committed to prison pending the order of the Minister for Home Affairs (the first appellant) to surrender the respondent to the Government of Thailand. The warrant of committal was issued by the Sessions Court on 10 January 2014 ("warrant of committal").

[8] The respondent then filed an application for a writ of *habeas corpus* at the Kuala Lumpur High Court but the application was dismissed on 26 March 2014.

[9] An appeal was filed by the respondent to the Federal Court. On 26 August 2014 the Federal Court allowed the appeal and ordered the case to be re-heard before another High Court Judge as the decision made on 26 March 2014 was made without the benefit of the grounds of judgment of the Sessions Court Judge who issued the warrant of committal.

[10] The case was re-heard before another High Court Judge.

[11] References in this judgment to the proceedings in the High Court and the decision and order of the High Court are references to the proceedings before the second High Court Judge and to his decision and order.

At The High Court

[12] According to the learned High Court Judge, the four grounds raised before him by counsel for the respondent were:

(a) issue of dual criminality;

(b) issue of rule of speciality;

(c) discrepancy in the weight of the drugs; and

(d) failure to prove a *prima facie* case as required by sub-s. 19(4) of the Extradition Act.

[13] In his grounds of judgment, the learned High Court Judge said:

> Meneliti Alasan Penghakiman Tuan HMS, saya berpuas hati atas alasan yang diberikan untuk isu-isu lain namun saya berkeputusan dan tidak bersetuju atas Isu 3 dan 4 dan tidak dapat menerima alasan oleh Tuan HMS atas isu "rule of speciality" dan "dual criminality" ini.

[14] The learned High Court Judge further said:

> Mahkamah ini melihat pada satu isu sahaja iaitu "rule of speciality" dan "dual criminality" selain dari tiadanya undertaking yang pihak kerajaan Thailand yang mereka akan hanya menuduh pemohon atas Bhg VI s. 8(e) Akta. Mahkamah ini merujuk kepada affidavit DPP Thailand ... menyatakan bahawa "If the alleged offender is apprehended or taken by any means, he will be notified of the additional charges and then be prosecuted ... .

[15] The learned High Court Judge found that the affidavits indicated that the respondent would be prosecuted for additional offences other than those in the charges for which extradition was requested, and there was no undertaking by the Government of Thailand that the respondent would face only those charges. His Lordship was of the view that based on the Treaty, the nature and consequences of the charges that the respondent would face must be certain and proved at the *prima facie* stage under sub-s. 19(5) of the Extradition Act before a committal order could be made. Otherwise, the Sessions Court Judge must release the respondent.

[16] On 29 March 2016 the High Court Judge allowed the application for a writ of *habeas corpus* and ordered that the respondent be released from detention.

[17] The appellants appealed to this court against the order.

At The Federal Court

Submissions By The Appellants

On The Rule Of Speciality

[18] Before us, learned Senior Federal Counsel Awang Armadajaya submitted that the rule of speciality, which requires that the respondent only be tried for the offences for which his extradition was granted, was complied with in this case as the documents presented by the Thai authorities showed that the extradition request was based on the ten charges which the respondent was facing in Thailand. Those charges were for the offences of being in illegal possession of narcotics and for document forgery.

[19] The respondent was going to be returned to Thailand to stand trial only for the offences being considered by Malaysia in accordance with the extradition request. Any statement made in the affidavit of Mr Prasit Bourruk (an Assistant Public Prosecutor of Thailand) on other offences cannot be taken as "compelling evidence" that Thailand would prosecute him for those other offences.

[20] Learned Senior Federal Counsel submitted that the absence of an undertaking by the Thai Government that the respondent would not be detained or prosecuted in Thailand for any offence committed prior to his return pursuant to his extradition except for the offences for which the order for extradition is made is not a breach of the rule of speciality in view of the terms of the Thailand Order and the provisions of sub-s. 2(4) of the Extradition Act.

[21] It was also submitted for the appellants that should the Thai authorities prosecute the respondent for offences other than those for which he was extradited to Thailand, it would be a ground for a diplomatic protest by the Malaysian Government for a possible breach of international treaty.

[22] On the part of the respondent, should he be prosecuted for offences committed in Thailand prior to his extradition other than those for which he was extradited, he would be entitled to invoke the rule of speciality as a remedy or defence.

[23] Learned Senior Federal Counsel further submitted that in any case, the rule of speciality does not bar totally the prosecution of a person for offences other than those for which he is extradited. He can still be prosecuted for those other offences if he has been restored or has had an opportunity to return to the State by which he was surrendered to the requesting State.

Submissions By The Respondent

On The Rule Of Speciality

[24] Learned counsel for the respondent submitted that an arrangement to comply with the rule of speciality is not effective if there is compelling evidence that the requesting State is likely to breach the rule.

[25] In the case before us, learned counsel for the respondent submitted that the affidavit of Mr Prasit Bourruk as well as the affidavit of Colonel Songsak Raksasakul provided compelling evidence of the intention of the Thai authorities to act in breach of the rule of speciality.

[26] The respondent submitted that from the evidence of Police Captain Thinawudh Silapat, the search warrant obtained against the respondent showed that the investigation against the respondent was primarily for passport forgery and not the offences for which he was charged.

[27] It was also the respondent's contention that due to the provisions of sub-s. 10(3) of the Extradition Act, the Malaysian authorities are not entitled to give consent for the prosecution of a person for additional offences not being those for which he was extradited.

On The Rule Of Dual Criminality

[28] The respondent further submitted that any order for the committal of the respondent and his extradition to Thailand would also offend the rule of dual criminality as the offences in the charges upon which the extradition request was made are not offences which correspond to offences in Malaysia.

Analysis

[29] The issues for determination in this appeal are whether the committal order by the Sessions Court pending the extradition order by the Minister offends the rule of speciality and the rule of dual criminality.

Extradition Arrangement Between Malaysia And Thailand

[30] The extradition of fugitive offenders must be as provided for by the Legislature. In the case of the *Creole* referred to in *Jones and Dooby on Extradition and Mutual Assistance*, 3rd edn, at p. 10, the House of Lords held the unanimous view that extradition without an Act of Parliament was unlawful.

[31] In Malaysia, the law in force in relation to the extradition of fugitive offenders is as contained in the Extradition Act which replaces the Extradition Ordinance 1958 and the Commonwealth Fugitive Criminals Act 1967.

[32] Section 2 of the Extradition Act provides that "Where a binding arrangement has been entered into between Malaysia and any country for the extradition of fugitive criminals, the Minister may, by order to be published in the *gazette* reciting or embodying the terms of such arrangement, direct that the provisions of this Act shall apply to that country subject to any restriction, exception, modification, adaptation, condition or qualification contained in the order".

[33] The Thailand Order, embodying the terms of the arrangement between Malaysia and Thailand, being the Treaty between the Federation of Malaya and the Kingdom of Thailand which came into being pursuant to the exchange of notes dated 27 October 1959, for the mutual surrender of fugitive criminals in accordance with the provisions of the Treaty dated 4 March 1911 concluded between the King of Thailand and the King of the United Kingdom, was made by the Minister under s. 2 of the Extradition Act on 10 July 1992. The Thailand Order was published in the *gazette* as P.U.(A) 269/1992. It was deemed to have come into force on 21 February 1992, which was also the date of coming into operation of the Extradition Act.

[34] By virtue of sub-s. 2(4) of the Extradition Act, the Thailand Order is "conclusive evidence" that the arrangement referred to in the Thailand order "complies with the provisions of this Act", and that the Extradition Act applies in the case of Thailand, and "the validity of such order shall not be questioned in any legal proceedings whatsoever".

Rule Of Speciality

[35] The rule of speciality is that rule in extradition law that prohibits the State requesting the extradition of a person from prosecuting or punishing the extradited person for offences other than those for which the request for his extradition was based and for which he was extradited, subject to exceptions as provided for in the applicable extradition law.

[36] That rule is embodied in sub-s. 8(e) of the Extradition Act which provides as follows:

> 8. A fugitive criminal shall not be surrendered to a country seeking his return:
>
> ...
>
> (e) unless provision is made by the law of that country, **or in the extradition arrangement with that country**, that a fugitive criminal who has not had a reasonable opportunity of leaving that country **shall not be detained or tried in that country for any offence committed prior to his return, other than the extradition offence proved by the facts on which his surrender or return is based** or any lesser offence proved by the facts on which the return was grounded **unless the consent of the appropriate authority in the requested country has been obtained**; or
>
> ...
>
> (emphasis added)

[37] Article VI of the Treaty embodied in the Thailand Order states, in para. 2, that:

> VI. A person surrendered **can in no case be detained or tried** in the State to which the surrender has been made, **for any other crime or on account of any other matters than those for which the extradition shall have taken place**, until he has been restored or had an opportunity of returning to the State by which he has been surrendered.
>
> This stipulation does not apply to crimes committed after the extradition.
>
> (emphasis added)

[38] In view of the provisions of s. 2 of the Extradition Act and the Thailand Order, there is conclusive evidence that there is in existence with Thailand an extradition agreement that provides for the rule of speciality.

[39] In those circumstances, the provisions of sub-s. 8(e) of the Extradition Act have been complied with.

[40] The only issue that needs consideration in relation to the rule of speciality is the respondent's argument that where there is compelling evidence that the respondent would be prosecuted for offences other than those for which his extradition was requested, his extradition should be refused and therefore the order for his committal pending the order for his extradition should not have been made.

[41] According to the respondent, if there is compelling evidence that the requesting State (in this case Thailand) will act in breach of the rule of speciality, an extradition order cannot be granted. Reliance was placed on the following cases:

(a) *Ruiz and Others v . Central Criminal Court No. 5 of the National Court, Madrid* [2008] 1 WLR 2798 ("*Ruiz*");

(b) *Hilali v. Central Court of Criminal Proceedings No. 5 of the National Court of Madrid and Another* [2006] 4 All ER 435 ("*Hilali*");

(c) *Shankaran v. India And Another* [2014] EWHC 957 (Admin) ("*Shankaran*");

(d) *Brodziak v. Circuit Court in Warsaw, Poland And Other Appeals* [2013] EWHC 3394 ("*Brodziak*");

(e) *Edutanu v. Iasi Court of Law (Romania)* [2016] EWHC 124 (Admin) ("*Edutanul*").

[42] In the case of *Ruiz* referred to by the respondent, the court endorsed the following approach of Scott Baker U in the case of *Hilali*:

> It seems to us a surprising submission that Spain is likely to act in breach of the international obligations to which it has signed up. There is no evidence before us that it has done so in the past and in these circumstances we would need compelling evidence that it is likely to do so in the future.

[43] In the other cases relied upon by the respondent, similar views had been expressed. In the cases of *Shankaran*, *Brodziak*, and *Edutanu*, the courts held that the strong presumption is that the requesting States would act in accordance with their international obligations in respect of the rule of speciality. Hence, compelling evidence is required to displace that presumption.

[44] Malaysia has had an extradition arrangement with Thailand from as long ago as 1911, initially through Great Britain. Upon the enactment of the Extradition Ordinance 1958, the relationship forged by the Treaty between Great Britain and Thailand was reaffirmed by way of an exchange of notes in October 1959 and given legislative effect by the Extradition (Thailand) Order 1960. The arrangement continued without a break with the Thailand Order.

[45] There was no evidence at all before the courts below that Thailand had in the past acted in breach of the rule of speciality.

[46] The respondent relied, *inter alia*, upon the following statements in the affidavit of Mr Prasit, to show the existence of compelling evidence of the intention to act in breach of the rule of speciality:

A However, for the charges of "falsifying official documents (imprints of the exit stamp of the immigrations official), counterfeiting passports and having counterfeit passports for distribution, and taking by stealth or receiving property", the alleged offender has not yet been notified by the special case inquiry working group that there are additional charges against him because those criminal acts were found after the alleged
B offender had jumped bail and the Criminal Court had already issued the warrant of arrest of his alleged offender. **If the alleged offender is apprehended or taken by any means, he will be notified of the additional charges and then be prosecuted**.

... Besides, 5 confiscated foreign passports which were in possession of the
C alleged offender are genuine passports but had been reported lost and stolen. The Analysis Results Report revealed that 4 passports out of the exhibits of 5 passports confiscated by the officials (the exhibits nos. 4, 5, 6 and 8 in accordance with the list of exhibits attached to the indictment in Black Case No. Or 2974/2555 of the Criminal Court) have the imprints of the exit stamp no. S250 of Immigration Bureau at Suvarnabhumi
D International Airport appearing on them. Having interviewed related witnesses, they consistently asserted that those were forged imprints because the genuine exit stamps no. S250 had been suspending from use and storing in the depository of Immigration Bureau since June 20, 2007. Furthermore, several equipment, tools and appliances using for forging passports were found in the room of the alleged offender. All pieces of
E evidence in the case were sufficient to believe that the alleged offender had committed the aforesaid offences. Therefore, I duly considered and have given opinion to prosecute the alleged offender on the charges of having narcotics in schedule I, (heroin) in possession without permission, falsifying documents (foreign ID cards and driving licenses), counterfeiting passports, falsifying documents (imprints of the exit stamp
F of the immigration officials), having counterfeit passports for distribution, and taking by stealth or receiving stolen property.

(emphasis added)

[47] The statements in the affidavit of Colonel Songsak Raksasakul which
G the respondent said provide compelling evidence of the intention of the Thai authorities to act in breach of the rule of speciality are as follows:

I, as head of the special case inquiry team designated for this case, has concluded my opinion that it is appropriate to prosecute the alleged offender according to the aforesaid charges. However, for the charges of
H "falsifying officials documents (imprints of the exit stamp of the immigration official), counterfeiting passports and having counterfeit passports for distribution, and taking by stealth or receiving stolen property", the alleged offender has not been notified by the special case inquiry working group that there are additional charges against him because those criminal acts are found after the alleged offender had
I jumped bail during provisional release granted by the Pattaya Provisional Court, and the Criminal Court had issued the warrant of arrest of this

alleged offender later. If the alleged offender is apprehended or taken by any means, he will be notified of the additional charges and then be prosecuted.

... However, although 5 passports, the exhibits, are genuine, 3 of them belong to the Government of Italy and the rest belong to the Government of France, their real holders of which reported to their relevant embassies that they were stolen and lost in Thailand. All evidence in the case substantiates the criminal acts of the alleged offender. Therefore, I duly considered and gave opinion that it is deemed appropriate to prosecute the alleged offender on charges of "having narcotics in schedule 1 (heroin) in possession without permission, falsifying documents (foreign ID cards and driving licenses), counterfeiting passports, falsifying official documents (imprints of the exit stamp of the immigration official), having counterfeit passports for distribution, and taking by stealth or receiving stolen property".

(emphasis added))

[48] Reliance was also placed on the statements in the affidavit of Police Captain Thinawudth Silapat that the search warrant obtained against the respondent was for passport forgery, and on the Captain's detailed account of his investigation which focused on the respondent's alleged role in forging and selling fake or forged passports.

[49] Do those statements constitute compelling evidence that the Thai authorities would act in breach of the rule of speciality?

[50] Mr Prasit's and Colonel Songsak's statements quoted above appear in their accounts of what transpired during investigations, the subsequent raid and confiscation of evidence as well as the respondent's arrest.

[51] A close reading of the affidavits would show that Mr Prasit and Colonel Songsak were merely making the statements that the additional charges were not yet notified to the respondent as he had jumped bail and that he would, when arrested, be notified of the additional charges and be prosecuted. There is nothing in those statements to indicate that the proposed notification and prosecution of the additional offences would be proceeded with after the respondent's extradition and in breach of the Treaty.

[52] In fact, Mr Prasit stated in his affidavit that "**Once the alleged offender is extradited to Thailand, he will be brought to criminal court to begin the proceedings in the case that was prosecuted by me**" (emphasis added). The offences prosecuted by Mr Prasit are, as stated in para. 8 of the affidavit for the charges of "having narcotics in schedule 1 (heroin) in possession without permission and falsifying documents".

[53] The affidavits of the three Thai officers cannot, in our considered view, be said to be "compelling evidence" that the Thai authorities would act in breach of the rule of speciality as specified in the Treaty embodied in the Thailand Order. The issue of the Thai Government providing an undertaking therefore does not arise.

Rule Of Dual Criminality

[54] Simply put, the rule of dual or double criminality in extradition law is that requirement that to be an extraditable offence the act constituting the offence must be an offence in both the requesting and requested States and must have been committed in the territory of the requesting State.

[55] The rule of dual/double criminality is embodied in s. 6 of our Extradition Act, which reads as follows:

> 6. (1) A fugitive criminal shall only be returned for an extradition offence.
>
> (2) For the purpose of this Act, an extradition offence is an offence, however described, including fiscal offences:
>
> (a) which is punishable, under the laws of a country referred to under paragraph 1(2)(a) or 1(2)(b), with imprisonment for not less than one year or with death; and
>
> (b) which, if committed within the jurisdiction of Malaysia, is punishable under the laws of Malaysia with imprisonment for not less than one year or with death:
>
> Provided that, in the case of an extraterritorial offence, it is so punishable under the laws of Malaysia if it took place in corresponding circumstances outside Malaysia.
>
> (3) An offence shall also be an extradition offence if it consists of an attempt or a conspiracy to commit, or an abetment of the commission of, any offence described in subsection (2).

[56] The charges against the respondent according to the case filed in the Criminal Court in Thailand are for possession of heroin and document forgery. The charges are as follows:

> 1.1 On June 8, 2012, in the daytime, the accused dared to possess heroin (5 tubes weighing 0.141 gram), which is a narcotic of Schedule I/Category I in the Narcotics Act B.E.2522 (1979), the Narcotics Act (No. 2) B.E.2528 (1987), and the Ministry of Public Health's Proclamation (No. 135) B.E.2539 (1996) of the names and types of narcotics prescribing in the Narcotics Act 1979, clause 2, and the List in the Annex attached to such Proclamation of the Ministry of Public Health published in the Government Gazette, and the accused had acknowledged the text of this proclamation. The illegal possession of heroin of the accused was the act violating the laws.
>
> 1.2 From the beginning of January 2011 to June 8, 2012, in the daytime but unknown date and time of the occurrence, the accused dared to counterfeit all parts of a document, an Italian health card, by using plastic material and writing the text REPLVBBIGA ITALIANA TESSERA SANITARIA, with the code CRDMML81L18BII4U, dated 20/10/2020, in the name of DI GRE GORIO BRUNO ALIX, a male gender where the place of birth is France and the date of birth is 26 JUN 1983, with

the photo. This is a counterfeit document aiming to deceive any person to believe that it is genuine which is likely to cause damage to the others or people.

1.3 From January 2011 to June 8, 2012, in the daytime but unknown date and time of the occurrence, the accused dared to counterfeit all parts of a document, an Italian ID card, by using plastic material and writing the text REPVBBLICA ITALIANA CARTA D'IDENTITA, in the name of MAIR MICHAEL, 25 AUG 1973 BOLZANO (BZ) 3025 NATALIO ST SETIRO, HANET.DEL 012569, BOLZAND ITALY, NO. 325698743, with the photo. This is a counterfeit document aiming to deceive any person to believe that it is genuine which is likely to cause damage to the others or people.

1.4 From the beginning of January 2011 to June 8, 2012, in the daytime but unknown date and time of the occurrence, the accused dared to counterfeit all parts of a document, an Italian ID card, by using plastic material and writing the text REPVBBLICA ITALIANA, CARTA D'IDENTITA, in the name of DI GREGORIO BRUNO ALIX, 26 JUN 1983, PARAY LE MONIAL (FRA), NO. 129058890, with the photo. This is a counterfeit document aiming to deceive any person to believe that it is genuine which is likely to cause damage to the others or people.

1.5 From January 2011 to June 8, 2012, in the daytime but unknown date and time of the occurrence, the accused dared to counterfeit all parts of a document, an Italian ID card, by using plastic material and writing the text REPVBBLICA ITALIANA, TESSERA JANITARIA, with the code CRDMML81L18B114U, in the name of MAIR MICHAEL, BOLZAND, with the date of birth 25 AUG 1973, and other texts and the photo. This is a counterfeit document aiming to deceive any person to believe that it is genuine which is likely to cause damage to the others or people.

1.6 From January 2011 to June 8, 2012, in the daytime but unknown date and time of the occurrence, the accused dared to counterfeit all parts of a document, an Italian ID card, by using plastic material and writing the text REPVBBLICA ITALIANA, CARTA D'IDENTITA, in the name of MAIR MICHAEL, 25 AUG 1973 BOLAND (BZ), No. LK 65SDFG65DF9 RTGS, with other texts and the photo. This is a counterfeit document aiming to deceive any person to believe that it is genuine which is likely to cause damage to the others or people.

1.7 From January 2011 to June 8, 2012, in the daytime but unknown date and time of the occurrence, the accused dared to counterfeit all parts of a document, an Italian ID card, by using plastic material and writing the text REPVBBLICA ITALIANA, TESSERA SANITARIA, with the code CRDMHLSILI8S114U, in the name of DI GREGORIO BRUNO ALIX, with the date of birth 25 JUN 1983, and other texts and the photo. This is a counterfeit document aiming to deceive any person to believe that it is genuine which is likely to cause damage to the others or people.

1.8 From January 2011 to June 8, 2012, in the daytime but unknown date and time of the occurrence, the accused dared to counterfeit all parts of an ID card, by using plastic material and writing the text REPVBBLICA

ITALIANA, CARTA D'IDENTITA, in the name DI GREGORIO BRUNO ALEX, No. KGRDVG6541740H125, with other texts and the photo. This is a counterfeit document aiming to deceive any person to believe that it is genuine which is likely to cause damage to the others or people.

1.9 From January 2011 to June 8, 2012, in the daytime but unknown date and time of the occurrence, the accused dared to counterfeit all parts of an ID card by using plastic material and writing the text ITALIAN INTERNATIONAL DRIVING LICENSE, in the name of MR. ABRIOLA JULIEN, with other texts and the photo. This is a counterfeit document aiming to deceive any person to believe that it is genuine which is likely to cause damage to the others or people.

1.10 From January 2011 to June 8, 2012, in the daytime but unknown date and time of the occurrence, the accused dared to counterfeit all parts of an Italian ID card by using plastic material and writing the text DEUTSCHLAND IDENTIFICATION CARD, No. 682473954, in the name of MR. MULLER FLORAIN, with other texts and the photo. This is a counterfeit document aiming to deceive any person to believe that it is genuine which is likely to cause damage to the others or people.

[57] A translation in the English language of the relevant Thai law is found in exh. "HAO-6A" exhibited to the affidavit deposed by Haliza Aini binti Othman, the Senior Federal Counsel handling the matter in the Attorney General's Chambers of Malaysia. The offence of counterfeiting a document or part of a document falls within s. 264 of the Thai Penal Code. The relevant portion of that section reads as follows:

Section 264. Whoever forges a whole or part of a document, adds, removes or falsifies by any means upon a genuine document; affixes with a counterfeit seal; or puts a forged signature to a document in a manner likely to cause damage to any person or the people, where it is committed with intent to cause any other person to believe that it be a genuine document is said to commit the offence of forgery of documents, and shall be liable to imprisonment for not exceeding three years or a fine not exceeding six thousand Baht, or both.

[58] Thus, in this case, for each of the nine forgery/counterfeiting offences with which the respondent has been charged, the punishment is imprisonment not exceeding three years or a fine not exceeding 6,000 Baht or both.

[59] By virtue of the provisions of s. 91 of the Thai Penal Code, however, the total punishment that can be imposed in cases where the offender commits several distinct and different offences shall not exceed ten years of imprisonment where the heaviest offence is punishable with a maximum punishment not exceeding three years of imprisonment.

[60] With regard to the narcotics offence, the drug which is the subject matter of the charge is heroin. That drug is classified as a category I drug according to s. 7 of the Narcotics Act B.E. 2522 (1979) of Thailand.

[61] Section 15 of the Narcotics Act of Thailand provides that "no person shall produce, import, export, dispose of or possess narcotics of category I, unless the Minister permits for the necessity of the use for government service". That section also provides a presumption that the drug is for disposal if the drug is:

(1) Dextrolyzer of LSD ....

(2) Amphetamine or a derivative of amphetamine ...

(3) Narcotics of category I unless (1) and (2) is of the quantity computed to be of pure substances of three grams or more.

[62] Section 67 of the Narcotics Act provides that any person "who possesses narcotics of category I without permission and in quantity computed to be pure substances, or in number of used dosage, or in net weight, that does not reach the quantity prescribed in s. 15 para. 3, shall be liable to imprisonment for a term of one year to ten years, or to a fine of 20,000 to 2000,000 Baht, or to both".

[63] As the drug which is the subject matter of the narcotics charge against the respondent is heroin (a narcotic in category I) and the weight of the drug in question is 0.141g (which is less than 3g) the respondent, if convicted of that charge, is liable to an imprisonment term of between one to ten years.

[64] For the offences in the nine charges which relate to the counterfeiting of documents, the equivalent law in Malaysia is in ss. 463, 464, 465 and 468 of the Penal Code, the relevant parts of which are as follows:

463. Whoever makes any false document or part of a document with intent to cause damage or injury to the public or to any person, or to support any claim or title, or to cause any person to part with property, or to enter into any express or implied contract, or with intent to commit fraud or that fraud may be committed, commits forgery.

464. A person is said to make a false document:

(a) who dishonestly or fraudulently makes, signs, seals or executes a document or part of a document, or makes any mark denoting the execution of a document, with the intention of causing it to be believed that such document was made, signed, sealed or executed by, or by the authority of a person by whom or by whose authority he knows that it was not made, signed, sealed or executed, or at a time at which he knows that it was not made, signed, sealed or executed;

465. Whoever commits forgery shall be punished with imprisonment for a term which may extend to two years or with fine or with both.

468. Whoever commits forgery, intending that the document forged shall be used for the purpose of cheating, shall be punished with imprisonment for a term which may extend to seven years, and shall also be liable to fine.

[65] Under Malaysian law, even for simple forgery, the offence is punishable with imprisonment which may extend to three years. However, in the case of the offences in the nine charges against the respondent for counterfeiting/forgery, it is clear that what was intended to be proved was that the counterfeited documents would be used for cheating. In those circumstances, s. 468 is the applicable provision and thus the punishment is imprisonment which may extend to seven years.

[66] The offence of forgery is clearly listed as item 6 in the list of offences in art. II of the Treaty embodied in the Thailand Act.

[67] In our considered view therefore, the rule of dual criminality has not been breached in relation to the nine charges for the counterfeiting of documents.

[68] In relation to the charge of possession of narcotics (heroin), the equivalent provision in Malaysian law is contained in Part IV of the Dangerous Drugs Act 1952, specifically sub-s. 11(1) and sub-ss. 12(2) and (3). Subsection 12(2) makes it an offence if a person has in his possession without authorisation a drug to which Part IV applies. Subsection 11(1) applies Part IV to the dangerous drugs listed in Parts III, IV and V of the First Schedule to the Act. Heroin is listed in Part Ill of the First Schedule.

[69] The punishment for being in possession of heroin without authorisation is a fine not exceeding RM100,000 or imprisonment not exceeding five years.

[70] The provisions of s. 6 of the Extradition Act on dual criminality have been clearly satisfied.

[71] The only issue however is the specific absence of offences relating to possession of narcotics in the list of extradition offences in the Treaty embodied in the Thailand Order.

[72] The appellants pointed us in the direction of the final paragraph in art. II of the Treaty in the Thailand Order which provides as follows:

> Extradition may also be granted at the discretion of the State applied to in respect of any other crime for which, according to the law of both the Contracting Parties for the time being in force, the grant can be made.

[73] As can be seen from the above discussion, the narcotic offence with which the appellant is charged is an extradition offence under s. 6 of our Extradition Act. The only question is whether the offence is also an extraditable offence under the Thai law.

[74] In our view, as the discretion lies with State to which the extradition request is made as to whether to grant extradition for an offence not listed in art. II, it is that State which is in the best position to determine if the grant can be made.

[75] In the case before us, the request had been made to Malaysia but the Minister had yet to make his order for extradition at the point in time that the application for *habeas corpus* was made by the respondent.

[76] However, the fact that the request was being processed by the Malaysian Government in accordance with the Thailand Order and the Extradition Act is *prima facie* evidence of the Government's satisfaction that the grant could be made.

[77] What remains certain is that an extradition order can certainly be made based on the nine forgery charges.

Conclusion

[78] Based on the above reasons, we allowed this appeal.